

**Before the
Federal Communications Commission
Washington, D.C. 20554**

In the matter of)	
)	
TRANS VIDEO COMMUNICATIONS, INC.)	File Nos. BPIFH-20000818AJP
)	BPIFH-20000818ALR
For Authority to Construct and Operate New)	BPIFH-20000818BDO
Instructional Television Fixed Service Response)	BPIFH-20000818BYE
Station Hubs Using I Channels in Various)	BPIFH-20000818BYH
Locations in New York)	BPIFH-20000818CGV

MEMORANDUM OPINION AND ORDER

Adopted: September 2, 2003

Released: September 5, 2003

By the Chief, Public Safety and Private Wireless Division, Wireless Telecommunications Bureau:

I. INTRODUCTION

1. In this *Memorandum Opinion and Order*, we address the above-captioned applications filed by Trans Video Communications, Inc. (TVC) for authority to construct and operate new Instructional Television Fixed Service (ITFS) response station hubs using I channels in various locations in New York.¹ TVC proposes to construct new response station hubs using Channels I2, I6, I10, I14, I17, I18, I21, I22, I25, I26, and I30 associated with ITFS Stations KZE20, KNZ69, KNZ70, KVS31, WHR691, KRS81, and KRS82.² In this connection, TVC seeks a waiver of Section 74.902(c) of the Commission's Rules, which prohibits new ITFS applications for certain channels shared with Multipoint Distribution Service (MDS).³ Additionally, we address petitions to deny filed by the Grand MMDS Alliance New York F/P Partnership Inc. (Grand Alliance) and the Roman Catholic Diocese of Rockville Centre (Roman Catholic Diocese).⁴ For the reasons stated below, we grant the Roman Catholic Diocese Petition, grant the Grand Alliance Petition in part and dismiss that petition in part, and dismiss the applications.

¹ Applications for New ITFS Stations - File Nos. BPIFH-20000818AJP, BPIFH-20000818ALR, BPIFH-20000818BDO, BPIFH-20000818BYE, BPIFH-20000818BYH, BPIFH-20000818CGV (filed August 18, 2000) (collectively, the applications).

² Stations KRS81 and KRS82 are licensed to Department of Education, Archdiocese of New York. TVC is the licensee of ITFS Stations KNZ69 in Brooklyn, KNZ70 in Queens, KZE20 in Queens, and WHR691 in Manhattan. Station KVS31 in Brooklyn is licensed to the Roman Catholic Diocese of Brooklyn New York.

³ See 47 C.F.R. § 74.902(c).

⁴ Petition to Deny filed by Grand MMDS Alliance New York F/P Partnership Inc. (filed Apr. 2, 2001) (Grand Alliance Petition); Petition to Deny filed by Roman Catholic Diocese of Rockville Centre (filed Apr. 2, 2001) (Roman Catholic Diocese Petition).

II. BACKGROUND

2. In 1963, the Commission established ITFS in the 2500-2690 MHz band on a shared basis with existing Fixed Service stations.⁵ When the Commission established ITFS, it indicated that the service was envisioned to be used for transmission of instructional material to selected receiving locations in accredited public and private schools, colleges and universities for the formal education of students.⁶ It also permitted ITFS licensees to use the channels for incidental purposes.⁷ These incidental purposes included the transmission of cultural and entertainment material to those receiving locations; special training material to selected receiving locations outside the school system (such as hospitals, nursing homes, training centers, clinics, rehabilitation centers, and commercial and industrial establishments); and special material to professional groups or individuals to inform them of new developments and techniques in their fields and instruct them in their use. ITFS licensees also could utilize the channels to perform other related services directly concerned with formal or informal instruction and training.⁸ In addition, when the ITFS facilities were not being used for such incidental purposes, the licensee could use them for administrative traffic (e.g., transmission of reports, assignments and conferences with personnel);⁹ however, individual stations, or complete systems could not be licensed solely for handling administrative traffic.¹⁰

3. An ITFS response station is authorized to provide communication by voice, video and/or data signals with its associated ITFS response station hub or associated ITFS station.¹¹ Each main channel has an associated 125 kHz response channel¹² that may be used for response stations.¹³ ITFS response stations may operate on either all or part of a 6 MHz channel assigned a licensee, and/or on any of the 125 kHz response channels assigned to a licensee.¹⁴

4. In 1983, the Commission redesignated the E Group and F Group channels from ITFS to the Multichannel Multipoint Distribution Service (MMDS).¹⁵ The Commission took that action in an effort to spur the development of competition to cable television systems and to promote effective and intense utilization of the spectrum.¹⁶ As part of its decision, the Commission allowed ITFS licensees

⁵ See *Educational Television Report and Order*, Docket No. 14744, 39 FCC 846 (1963) (*MDS R&O*), *recon. denied*, 39 FCC 873 (1964) (*ETV Decision*).

⁶ Amendment of the Commission's Rules With Regard to the Instructional Television Fixed Service, the Multipoint Distribution Service, and the Private Operational Fixed Microwave Service; and Applications for an Experimental Station and Establishment of Multi-Channel Systems, *Report and Order*, 48 Fed. Reg. 33873, 33875 ¶ 9 (1983) (*1983 R&O*) (*citing ETV Decision*, 39 FCC 846, 853 ¶ 25).

⁷ *Id.*

⁸ *Id.*

⁹ *Id.*

¹⁰ *Id.*

¹¹ 47 C.F.R. § 74.939(a).

¹² The 125 kHz channels are located in the 2686-2690 MHz band. 47 C.F.R. § 74.939(j).

¹³ *Id.*

¹⁴ *Id.*

¹⁵ In the Matter of Amendment of Parts 2, 21, 74 and 94 of the Commission's Rules and Regulations in regard to frequency allocation to the Instructional Television Fixed Service, the Multipoint Distribution Service, and the Private Operational Fixed Microwave Service, GN Docket No. 80-112, CC Docket No. 80-116, *Report and Order*, 94 FCC 2d 1209 (1983) (*E and F Group Reallocation Order*).

¹⁶ *Id.*, 94 FCC 2d at 1228 ¶¶ 60-61.

currently operating on the E Group and F Group channels to remain operating, but placed the following limitations on such stations:

Grandfathered ITFS stations operating on the E and F channels will only be protected to the extent of their service that is either in the operation or the application stage as of May 26, 1983. These licensees or applicants will not generally be permitted to change transmitter location or antenna height, or to change transmission power. In addition, any new receive stations added after May 26, 1983 will not be protected against interference from MDS transmissions. In this fashion, all facets of grandfathered ITFS operations were frozen as of May 26, 1983.¹⁷

Further, this limitation applies to ITFS use of the 125 kHz response channels associated with the E and F Group channels.¹⁸

5. The Commission stated that “there may be instances where the natural evolution of an ITFS may reasonably require the addition of receive stations without changing the nature or the scope of the ITFS operation” that would justify the addition of additional receive sites.¹⁹ In those instances, the Commission stated that the grandfathered ITFS licensee could request a waiver of Section 74.902(c).²⁰

6. TVC is the licensee of grandfathered ITFS Station KNZ70, Queens, New York, which operates on the F Group channels. On August 18, 2000, TVC filed the captioned applications for response station hubs using I channels at various locations in New York.²¹ TVC proposes to construct new response station hubs using channels I2, I6, I10, I14, I17, I18, I21, I22, I25, I26, and I30 associated with ITFS Stations KZE20, KNZ69, KNZ70, KVS31, WHR691, KRS81, and KRS82.²² Because Section 74.902(c) of our Rules restricts the ability of ITFS stations authorized on the E Group and F Group channels to modify their facilities, TVC requested a waiver of this rule in connection with the applications. Specifically, TVC seeks to modify the licenses for Station KNZ70 (F1-4), Queens, New York by “installing a response station hub for two-way services, including the use of I-Channels associated with grandfathered E- and F-Channels ITFS stations.”²³ TVC also proposes to use response station channels associated with the E Group channels.²⁴ The applications appeared on public notice as tendered for filing on November 29, 2000²⁵ and as accepted for filing on February 1, 2001.²⁶ On January

¹⁷ In the Matter of Amendment of Parts 2, 21, 74 and 94 of the Commission's Rules and Regulations in regard to frequency allocation to the Instructional Television Fixed Service, the Multipoint Distribution Service, and the Private Operational Fixed Microwave Service, GN Docket No. 80-112, CC Docket No. 80-116, *Memorandum Opinion and Order on Reconsideration*, 98 FCC 2d 129, 132-33 ¶ 12 (1983) (*E and F Group Reallocation Reconsideration Order*).

¹⁸ 47 C.F.R. § 74.902(c).

¹⁹ *Id.* at n.8.

²⁰ *Id.*

²¹ See the Applications.

²² Stations KRS81 and KRS82 are licensed to Department of Education, Archdiocese of New York. TVC is the licensee of ITFS Stations KNZ69 in Brooklyn, KNZ70 in Queens, KZE20 in Queens, and WHR691 in Manhattan. Station KVS31 in Brooklyn is licensed to the Roman Catholic Diocese of Brooklyn New York.

²³ Applications for New ITFS Stations, *supra* note 1 exhibit 1 at 1 (Waiver Request).

²⁴ See Letter from William D. Wallace, Esq., Counsel for TVC to Reference Room, FCC (January 29, 2001) (File Nos. BNAIFH-20010129ACY, BNAIFH-20010129ADU, BNAIFH-20010129ADW, BNAIFH-20010129ADL, BNAIFH-20010129ACM, BNAIFH-20010129ACT) (Amendment), Exhibit 2, p. 2.

²⁵ See MMB Public Notice Report No. 148 (rel. Nov. 29, 2000).

29, 2001, TVC amended the applications, using FCC Form 331, to revise the definitions, size, and orientation of the response service areas.²⁷

7. On April 2, 2001, Grand Alliance and Roman Catholic Diocese filed petitions to deny.²⁸ Grand Alliance states that the applications (1) are inconsistent with Commission rules limiting new applications by grandfathered ITFS licensees, (2) preclude Grand Alliance from developing its own I Channel and associated F Group channel MDS facilities for two-way transmissions, and (3) fail to demonstrate protection of G Group licensees from harmful interference.²⁹ Roman Catholic Diocese states that the applications fail to satisfy the Commission's interference protection criteria with respect to Petitioner's I Channel stations previously authorized to or proposed by the Roman Catholic Diocese in the greater Long Island, New York area.³⁰ Roman Catholic Diocese also states that it did not grant consent to the applications filed by TVC.³¹

III. DISCUSSION

A. Grand Alliance Petition

8. In part of its petition, Grand Alliance argues that TVC's applications are defective because TVC failed to demonstrate interference protection to ITFS stations operating on Channel G4 (2680-2686 MHz).³² Generally, to establish standing in licensing matters, a petitioner must allege sufficient facts to demonstrate that failure to grant the requested relief would cause the petitioner to suffer a direct injury.³³ In this case, Grand Alliance has not alleged that it holds a license for Channel G4 or that it has any relationship with an entity holding such a license. Accordingly, we dismiss that portion of Grand Alliance's petition that makes arguments concerning potential harmful interference to Channel G4 operations for lack of standing.

9. We now proceed to consider the balance of the Grand Alliance Petition. We agree with Grand Alliance that TVC has not demonstrated that a waiver of Section 74.902(c) of the Commission's Rules is warranted under the circumstances presented. "An applicant for waiver faces a high hurdle even at the starting gate. 'When an applicant seeks a waiver of a rule, it must plead with particularity the facts

(...continued from previous page)

²⁶ See MMB Public Notice Report No. 164 (rel. Feb. 1, 2001).

²⁷ See Amendment.

²⁸ Petition to Deny filed by Grand MMDS Alliance New York F/P Partnership Inc. (filed Apr. 2, 2001) (Grand Alliance Petition); Petition to Deny filed by Roman Catholic Diocese of Rockville Centre (filed Apr. 2, 2001) (Roman Catholic Diocese Petition). On April 24, 2001, TVC filed an Opposition to Consolidated Petition to Deny. On May 11, 2001, Grand Alliance submitted its Reply to TVC's opposition. On June 1, 2001, counsel for TVC wrote a letter to the Commission requesting dismissal of Grand Alliance's Petition to Deny. See Letter dated June 1, 2001 from William D. Wallace, Esq. to Magalie Roman Salas, Secretary, Federal Communications Commission (filed Jun. 1, 2001). After submitting several Motions for Extension of Time, on December 17, 2002, TVC filed a consolidated response to Roman Catholic Diocese's petitions to deny (TVC Opposition to Roman Catholic Diocese).

²⁹ Grand Alliance Petition at 1.

³⁰ Roman Catholic Diocese Petition at 1-2. *Id.* Engineering Statement of Stephen Daugherty (Daugherty Statement).

³¹ Roman Catholic Diocese Petition at 2.

³² Grand Alliance Petition at 10-13.

³³ Daniel R. Goodman, Receiver; Dr. Robert Chan, Petition for Waiver of Sections 90.633(c) and 1.1102 of the Commission's Rules, *Order on Reconsideration*, 14 FCC Rcd 20547, 20549 ¶ 4 (1999).

and circumstances which warrant such action.”³⁴ Based upon the record before provided to us, we conclude that TVC has not made a sufficient waiver showing.

10. TVC argues that its request to implement two-way services should be considered part of the “natural evolution” of the station and the services it provides.³⁵ TVC also argues that allowing TVC to offer two-way services would significantly expand the use of the frequencies and the instructional services TVC can offer.³⁶ TVC further argues that a waiver would be consistent with the underlying purpose of the rule because TVC’s proposed facilities would not cause interference to Grand Alliance’s facilities.³⁷

11. A heavy burden traditionally has been placed upon those seeking waivers to demonstrate that their arguments are substantially different from those that were carefully considered in a relevant rulemaking proceeding.³⁸ In the rulemaking proceeding reallocating the E Group and F Group channels (as well as the associated response channels) to MDS, the Commission clearly intended that “all facets of grandfathered ITFS operations [would be] frozen as of May 26, 1983.”³⁹ In making that determination, the Commission determined that it would be in the public interest to allow MDS operators to use these channels, as opposed to allowing ITFS operators to modify or expand their systems. TVC fails to demonstrate how it is different from any other grandfathered E or F Group licensee in this regard.

12. We also reject TVC’s argument that it should receive a waiver pursuant to the Commission’s statement that it might consider waivers that were part of the “natural evolution” of an ITFS system. In making that statement, the Commission limited the “natural evolution” exception to changes that would not change “the nature or the scope of the ITFS operation.”⁴⁰ In this case, TVC proposes to add new facilities operating on different frequencies and to introduce two-way service on its system. We consider TVC’s proposed response station hubs to be a significant change and expansion of its currently authorized system. Moreover, TVC has failed to demonstrate otherwise.

13. Finally, while we note that TVC contends that a waiver would allow it to expand its instructional services, it provides no details concerning the nature of the services that it will provide using the proposed facilities. We also find it significant that TVC has not shown the unavailability of a reasonable alternative. Specifically, we note that TVC is also licensed on the B Group channels under call signs KNZ69, KZE20, and WHR691. TVC has not explained why it could not design a system using the B Group channels and associated response channels to provide the proposed two-way services. Accordingly, we conclude that TVC has not demonstrated that grant of a waiver of Section 74.902(c) with respect to the use of the response channels associated with the E and F Groups is warranted under the circumstances presented.

B. Roman Catholic Diocese Petition

14. Section 74.939(i) of the Commission’s Rules requires all applicants for new or modified MDS or ITFS stations to demonstrate interference protection to all response station hubs within 100 miles of

³⁴ *WAIT Radio v. FCC*, 418 F.2d 1153, 1157 (D.C. Cir. 1969) (citing *Rio Grande Family Radio Fellowship, Inc. v. FCC*, 406 F.2d 664 (D.C. Cir. 1968) (*per curiam*)).

³⁵ Waiver Request at 1.

³⁶ *Id.* See also Opposition at 7-8.

³⁷ Opposition at 8.

³⁸ *Industrial Broadcasting Co. v. FCC*, 437 F.2d 680 (D.C. Cir. 1970) (*per curiam*).

³⁹ *E and F Group Reallocation Reconsideration Order*, 98 FCC 2d at 132-33 ¶ 12.

⁴⁰ *Id.*

the proposed facilities.⁴¹ Because TVC proposes to install a response station hub for two-way services at the transmitting facilities of ITFS Station KNZ70 (F1-4), Queens, New York, it is therefore required to comply with Section 74.939(i) of our Rules. After review of the applications, as amended, we find that TVC has failed to demonstrate that the proposed facilities would provide the requisite interference protection.

15. Although the applications as originally filed by TVC did not include the required interference analysis, TVC subsequently amended them to correct data and to provide the required interference analyses.⁴² Specifically, the Amendment revises the definitions, size, and orientation of the response service area (RSA) proposed for one facility by correcting a typographical error in the response station hub geographic coordinates of two seconds of longitude.⁴³ TVC states that, notwithstanding the “anomalous and potentially incomplete results for interference and power flux density studies involving I-Channel operation” produced by the EDX Engineering, Inc. software used to complete its applications, newer releases of the software accurately assess the I Channel power flux density and response station hub interference studies generated by the EDX program.⁴⁴ The Amendment also purports to address concerns about the channel utilization proposed for the facility because the RSA is located “entirely within the protected service areas (PSA) of stations KNZ-69, KNZ-70, KRS-81, and KRS-82.”⁴⁵

16. Notwithstanding the Amendment, we do not believe that the applications demonstrate the requisite interference protection to other response station hubs within 100 miles of the proposed facilities, as required by Section 74.939(i) of our Rules.⁴⁶ In this connection, we note that Roman Catholic Diocese, which is the licensee of the I Channels associated with its A Group channels of Call Sign KNZ67, also has pending applications for the I Channels associated with its B and E Group channels of Call Signs KNZ68 and KNZ65, respectively.⁴⁷ Roman Catholic Diocese submits an engineering statement to support its position that TVC’s proposed operation on A Group’s associated I Channels (I17 and I25), B Group’s associated I Channels (I2, I10, I18, I26), and E Group’s associated I Channels (I21 and I29) would cause impermissible interference to the I Channel response station hub (RSH) of Roman Catholic Diocese.⁴⁸

17. TVC states because the protected service areas of its stations and Roman Catholic Diocese’s stations overlap, it is difficult to engineer facilities that will not result “in some predicted interference into the other licensee’s facilities.”⁴⁹ TVC suggests that the Commission grant the

⁴¹ 47 C.F.R. § 74.939(i).

⁴² See Amendment.

⁴³ *Id.* at Exhibit 2.

⁴⁴ *Id.*

⁴⁵ *Id.* at 3.

⁴⁶ See In the Matter of Amendment of Parts 21 and 74 to Enable Multipoint Distribution Service and Instructional Television Fixed Service Licensees to Engage in Fixed Two-Way Transmission, *Report and Order*, MM Docket No. 97-217, 13 FCC Rcd 19112, 19145 ¶ 60 n.149 (1998) (“[w]here I channels are used for response transmissions to hubs under a hub license, the hubs will be afforded interference protection in the same manner as other MDS and ITFS hubs.”).

⁴⁷ Roman Catholic Diocese Petition at 1.

⁴⁸ *Id.* at Daugherty Statement. According to the Daugherty Statement, “if the ratio of the predicted aggregate undesired power flux density (UPFD) in front of the subject RSH antenna to the RSH receiver noise power flux density (NPFd) projected to the front of the antenna is greater than -5.9 dB, then the co-channel receive noise floor is raised by more than 1 dB, the specified FCC threshold.” *Id.* The Daugherty Statement finds that the UPFD/NPFd ratio is greater than -5.9 dB for the authorized KNZ65, KNZ67, and KNZ68 I Channel hubs. *Id.*

⁴⁹ TVC Opposition to Roman Catholic Diocese Petition at 3.

applications subject to the condition that it not cause interference to Roman Catholic Diocese's stations.⁵⁰ We believe that a grant of the applications subject to the condition suggested by TVC, would undermine the efficacy of Section 74.939(i) and would be inconsistent with the public interest, particularly in light of Roman Catholic Diocese's decision to not consent to the proposed operations. We therefore decline to adopt TVC's conditional grant approach under the circumstances presented.

IV. CONCLUSION AND ORDERING CLAUSES

18. We dismiss that portion of the Grand Alliance Petition that raises concerns regarding interference to a third party. With respect to the balance of the Grand Alliance Petition, however, we agree with Grand Alliance that TVC has not demonstrated that grant of a waiver of Section 74.902(c) of the Commission's Rules is warranted. Because TVC has failed to demonstrate the interference protection pursuant to Section 74.939(i) of the Commission's Rules, and given that TVC has not obtained the consent of Roman Catholic Diocese to exceed the interference thresholds⁵¹ despite best efforts to negotiate a resolution to this issue, we hereby dismiss the applications as defective.⁵²

19. Accordingly, IT IS ORDERED, pursuant to Sections 4(i) and 309 of the Communications Act of 1934, as amended, 47 U.S.C. § 154(i), 309, and Sections 21.30 and 74.912 of the Commission's rules, 47 C.F.R. §§ 21.30, 74.912, the Petition to Deny filed by the Roman Catholic Diocese of Rockville Centre on April 2, 2001, IS GRANTED.

20. IT IS FURTHER ORDERED, pursuant to Sections 4(i) and 309 of the Communications Act of 1934, as amended, 47 U.S.C. § 154(i), 309, and Sections 21.30 and 74.912 of the Commission's rules, 47 C.F.R. §§ 21.30, 74.912, the Petition to Deny filed by the Grand MMDS Alliance New York F/P Partnership Inc. on April 2, 2001, IS DISMISSED IN PART AND GRANTED IN PART.

21. IT IS FURTHER ORDERED, pursuant to Sections 4(i) and 309 of the Communications Act of 1934, as amended, 47 U.S.C. § 154(i), 309, and Sections 73.3566 and 74.912 of the Commission's rules, 47 C.F.R. §§ 73.3566, 74.912, that the applications filed by Trans Video Communications, Inc., FCC File Nos. BPIFH-20000818AJP, BPIFH-20000818ALR, BPIFH-20000818BDO, BPIFH-20000818BYE, BPIFH-20000818BYH, and BPIFH-20000818CGV, ARE DISMISSED.

22. This action is taken under delegated authority pursuant to Sections 0.131 and 0.331 of the Commission's rules, 47 C.F.R. § 0.131, 0.331.

FEDERAL COMMUNICATIONS COMMISSION

D'wana R. Terry
Chief, Public Safety and Private Wireless Division
Wireless Telecommunications Bureau

⁵⁰ *Id.*

⁵¹ *Id.* at 4.

⁵² See 73 C.F.R. § 73.3566; University System of the Ana G. Mendez Foundation, *et al.*, *Memorandum Opinion and Order*, 12 FCC Rcd 22934 (MMB VSD 1999) (applications patently not in compliance with the Commission's Rules will not be accepted for filing, and if accepted for filing, will be dismissed).